A

Public Prosecutor v Hassan Jafarpour

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(LB)-338–08 OF 2017
UMI KALTHUM, HARMINDAR SINGH AND STEPHEN CHUNG JJCA
11 APRIL 2019

C

Criminal Procedure — Appeal — Appeal against acquittal and discharge — Respondent charged with offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 — Trial judge found prima facie case established against respondent — Trial judge found prosecution failed to prove charge against respondent beyond reasonable doubt — Whether respondent failed to cast reasonable doubt on prosecution's case — Whether prosecution proved charge against respondent beyond reasonable doubt — Dangerous Drugs Act 1952 s 39B(1)(a)

D

The respondent was charged together with two others (second and third accused) in the High Court at Shah Alam for trafficking in 1,454g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge was premised under s 34 of the Penal Code. A police party led by SP5 went to the targeted area and took up ambush positions. A short while later, a Mitsubishi Lancer ('the said car') arrived and stopped about 15 meters from SP5. The said car was then blocked by the police party. SP5 rushed to the said car and identified himself and ordered the occupants of the car to alight. SP5 said that the respondent, who was seated in the rear seat of the said car behind the front passenger, came out of the said car and threw a black sling bag near the door of the said car. In the said bag was a plastic bag containing four plastic packets. The contents of the four plastic packets formed the subject matter of the charge. At the end of the prosecution's case, the learned judge accepted the evidence of SP5 and found no reason to disbelieve his evidence. The respondent was then ordered to enter his defence on the charge. The second and third accused were, however, acquitted without their defence being called. At the conclusion of the trial, the learned judge was doubtful that SP5 had seen the respondent threw the bag near the rear wheel of the car in view of the fact that the third accused had also run out from the same side of the car. The learned judge came to the finding that the prosecution had failed to prove the charge against the respondent beyond reasonable doubt. An order of acquittal and discharge followed as a consequence. Hence this appeal by the prosecution against the said acquittal.

E

F

G

H

I

Held, allowing the appeal; setting aside the order of acquittal by the High Court; and convicting the respondent and sentencing him to death:

(1) The criticism by the learned judge to the prosecution for not calling other witnesses to say that it was the respondent who threw the bag was unwarranted as a witness could not be disbelieved only on the ground that he was the only witness. The criticism by the learned judge that the prosecution should had called either the second or third accused as rebuttal witnesses was also misplaced as they were also charged together with the respondent under s 34 of the Penal Code. In the circumstances, the learned judge had entertained a fanciful or imaginary doubt based on conjecture rather than one raised by the evidence (see paras 28–30).

(2) The finding of acquittal by the learned judge was against the weight of evidence and in particular the unchallenged evidence of SP5 that it was the respondent who threw the bag. The evidence of throwing the bag by the respondent precipitated the irresistible inference that the respondent knew the bag contained illicit drugs (see para 32).

(3) The learned judge was right in finding that the existence of Ali Rahmani had no bearing on the illicit drugs recovered at the time of the respondent's arrest. This character was created by the respondent as his involvement with the respondent was never raised prior to the evidence of the respondent (see para 33).

(4) In all the circumstances of the case, the respondent had failed to cast any reasonable doubt on the case for the prosecution. He was proved to have been in possession with knowledge of the illicit drugs at the material time stated in the charge. He had also failed to rebut the presumption of trafficking. After considering the entirety of the evidence, the court found that the prosecution had proved the charge against the respondent beyond a reasonable doubt (see para 34).

[Bahasa Malaysia summary

Responden didakwa bersama dua orang lain (tertuduh kedua dan ketiga) di Mahkamah Tinggi di Shah Alam kerana mengedar 1,454g methamphetamine, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Tuduhan itu didasarkan di bawah s 34 Kanun Keseksaan. Pihak polis yang diketuai oleh SP5 pergi ke kawasan yang disasarkan dan membuat serangan hendap. Tidak lama kemudian, sebuah Mitsubishi Lancer ('kereta tersebut') tiba dan berhenti kira-kira 15 meter dari SP5. Kereta tersebut kemudian disekat oleh pihak polis. SP5 bergegas ke kereta itu dan mengenalkan dirinya dan memerintahkan penumpang kereta itu untuk turun. SP5 berkata responden, yang duduk di tempat duduk belakang kereta itu di belakang penumpang hadapan, keluar dari kereta itu dan melemparkan beg sling hitam berhampiran pintu kereta tersebut. Di dalam beg itu terdapat beg plastik yang mengandungi empat paket plastik. Kandungan empat paket plastik membentuk perkara tuduhan. Pada akhir kes pendakwaan, hakim yang bijaksana menerima keterangan SP5 dan mendapati tiada alasan untuk tidak

mempercayai keterangannya. Responden kemudiannya diperintahkan untuk memasuki pembelaan atas tuduhan itu. Tertuduh kedua dan ketiga bagaimanapun dibebaskan tanpa dipanggil pembelaan mereka. Pada akhir perbicaraan itu, hakim yang bijaksana meragui bahawa SP5 telah melihat responden melemparkan beg itu beredekatan tayar belakang kereta memandangkan fakta bahawa tertuduh ketiga juga telah keluar dari sisi yang sama dari kereta tersebut. Hakim yang bijaksana mendapati bahawa pihak pendakwaan gagal membuktikan pertuduhan terhadap responden melampaui keraguan munasabah. Perintah pelepasan dan pembebasan diikuti sebagai akibatnya. Oleh itu rayuan oleh pihak pendakwaan terhadap pelepasan tersebut.

Diputuskan, membeenarkan rayuan; mengetepikan perintah pelepasan oleh Mahkamah Tinggi; dan mensabitkan responden dan menjatuhkan hukuman mati:

(1) Kritikan oleh hakim yang bijaksana kepada pihak pendakwaan kerana tidak memanggil saksi lain untuk mengatakan bahawa responden yang melemparkan beg itu tidak wajar kerana saksi tidak dapat disangkal hanya atas alasan bahawa dia adalah satu-satunya saksi. Kritikan oleh hakim yang bijaksana bahawa pihak pendakwaan harus memanggil sama ada tertuduh kedua atau ketiga sebagai saksi pematahan juga salah kerana mereka juga dituduh bersama responden di bawah s 34 Kanun Keseksaan. Dalam keadaan ini, hakim yang bijaksana telah menganggap keraguan atau khayalan berdasarkan ramalan dan bukannya dibangkitkan oleh keterangan (lihat perenggan 28–30).

(2) Dapatan pelepasan oleh hakim yang bijaksana adalah bertentangan dengan keberatan keterangan dan khususnya keterangan tidak dicabar oleh SP5 bahawa responden yang membuang beg itu. Keterangan membuang beg oleh responden mencetuskan kesimpulan yang tidak dapat disangkal bahawa responden tahu beg itu mengandungi dadah haram (lihat perenggan 32).

(3) Hakim yang bijaksana adalah benar dalam meendapati kewujudan Ali Rahmani tidak mempunyai kesan terhadap dadah haram yang didapati pada masa penangkapan responden. Watak ini dicipta oleh responden kerana penglibatannya dengan responden tidak pernah dibangkitkan sebelum keterangan responden (lihat perenggan 33).

(4) Dalam semua keadaan kes tersebut, responden telah gagal memberikan apa-apa keraguan munasabah terhadap kes pendakwaan. Dia terbukti telah memiliki pengetahuan tentang dadah haram pada masa yang dinyatakan dalam pertuduhan. Dia juga gagal mematahkan anggapan pengedaran. Setelah menimbangkan keseluruhan bukti, mahkamah mendapati bahawa pihak pendakwaan telah membuktikan tuduhan

A terhadap responden melampaui keraguan munasabah (lihat perenggan 34).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

Badri vs State of Rajasthan [1976] 1 SCC 442, SC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)
Kesavan Krishnan lwn PP & Satu Lagi Rayuan [2015] 6 CLJ 163, CA (refd)
Kwang Boon Keong Peter v PP [1998] 2 SLR 592, HC (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Muthusamy v PP [1948] 1 MLJ 57 (refd)
Ram August Tewari And Ors vs Bindeshwari Tewari And Ors AIR 1972 Pat 142, HC (refd)
Selvam a/l Arjunan v PP [2012] 4 MLJ 755, CA (refd)
Vadivelu Thevar and Chinniah Servai vs The State of Madras AIR 1957 SC 614, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yusri bin Pialmi v PP [2011] 4 MLJ 533; [2010] 6 CLJ 878, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a)
Evidence Act 1950 ss 134, 146(a), 155
Penal Code s 34

Appeal from: Criminal Trial No 45A-94–10 of 2014 (High Court, Shah Alam)

Tetralina bt Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] The respondent was charged together with two others (second and third accused) in the High Court at Shah Alam for trafficking in 1,454g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The charge was premised under s 34 of the Penal Code. At the end of the prosecution's case, the second and third accused were acquitted without their defence being called. The respondent, who was the 1st accused, entered his defence. The learned trial judge acquitted him at the end of the defence case. Hence this appeal by the prosecution against the said acquittal.

[2] The appeal was heard on 22 January 2019. At the conclusion of the submissions, we unanimously allowed the appeal. We set aside the order of acquittal by the High Court and substituted in its place an order for conviction on the charge and sentence of death. Our reasons for doing so now follow. This will form the judgment of the court.

THE CASE FOR THE PROSECUTION

[3] The prosecution called six witnesses. The facts leading to the arrest of the respondent were set out in the judgment of the learned judge as follows (at pp 15–19, appeal record, Vol 1):

> [3] Pada 12/5/2014 jam lebih kurang 11.00 pagi, DSP Mohd Husni bin Manaf (SP5) telah menerima maklumat bahawa terdapatnya aktiviti pengedaran dadah yang akan dijalankan. Selanjutnya, pada jam lebih kurang 1.00 petang, SP5 mengetuai anggota pasukannya seramai 12 orang menuju ke tempat kejadian sepertimana yang dinyatakan di dalam pertuduhan (P2) untuk melakukan serbuan dengan menaiki empat buah kenderaan yang berasingan.
>
> [4] Lebih kurang 45 minit kemudian, SP5 dan anggotanya sampai di tempat kejadian. SP5 membuat pemerhatian di sekitar tempat itu lebih kurang 15 minit dan seterusnya melihat sebuah kereta jenis Mitsubishi Lancer berwarna hitam dengan nombor pendaftaran 'WWR 4557' (P34) telah datang dan berhenti di hadapan Kedai Dobi & Cucian Kering Ampang yang jaraknya lebih kurang 15 meter dari tempat beliau yang melakukan pemerhatian tersebut.
>
> [5] Pada masa tersebut, SP5 ternampak beberapa orang lelaki berada di dalam kereta (P34) tetapi tidak pasti jumlah dan bangsa lelaki-lelaki di dalam kereta (P34) tersebut. Setelah melihat kereta (P34) berhenti, SP5 mengarahkan supaya pasukan serbuannya untuk menggunakan kenderaan mereka bagi menghalang kereta (P34) tersebut dari bahagian belakang sisi kiri kereta (P34), bahagian sisi kanan kereta (P34) dan juga bahagian hadapan kereta (P34).
>
> [6] Kemudiannya, SP5 dan anggotanya keluar dari kereta mereka dan mengepung kereta (P34). Pada ketika itu, SP5 yang berdiri di bahagian hadapan kiri kereta mendapati terdapatnya tiga orang lelaki di dalam kereta (P34) itu.
>
> [7] SP5 pun memperkenalkan dirinya sebagai polis lalu mengarahkan tiga orang lelaki tersebut (ketiga-tiga orang Tertuduh di dalam kes ini) agar keluar dari kereta (P34). Tertuduh-Tertuduh tersebut telah keluar dari kereta (P34) dengan pantas dan cuba melarikan diri. Menurut SP5, beliau melihat Tertuduh Pertama yang keluar dari pintu penumpang belakang sebelah kiri kereta (P34) telah mencampakkan satu beg galas berwarna hitam yang bertulisan 'Hayrer' [P13(A)] di bahagian luar tepi pintu penumpang belakang sebelah kiri kereta (P34) tersebut. Tertuduh Kedua yang berperanan sebagai pemandu kenderaan tersebut keluar dari pintu kereta tempat pemandu manakala Tertuduh Ketiga melarikan diri dari sebelah pintu depan penumpang.
>
> [8] SP5 dan anggota serbuan yang lain kemudiannya bergelut dengan Tertuduh-Tertuduh tersebut sebelum berjaya menahan mereka bertiga. SP5 juga membuat pemeriksaan ke atas beg galas [P13(A)] yang dirampas tersebut dan mendapati di dalamnya ada satu beg plastik bertulisan myNews.com [P13(A)(1)]

yang mengandungi empat plastik lutsinar bertulisan REYNOLDS [P13(B)(1)–P13B(4)] yang berisi bahan berbentuk kristal yang disyaki dadah jenis syabu.

[9] SP5 selepas itu memasukkan semula barang dadah tersebut ke dalam beg galas [P13(A)] dan menjalankan pemeriksaan tubuh ke atas tiga orang Tertuduh tetapi tidak menemui apa-apa barang salah yang lain. SP5 membawa balik Tertuduh-Tertuduh bersama barang-barang yang dijumpai dan dirampas ke Pejabat Bahagian Siasatan Jenayah Narkotik IPD Ampang Jaya.

[10] SP5 telah mengeluarkan senarai pemeriksaan (P32) bagi barang-barang yang telah dirampas dari serbuan tersebut lalu menyerahkannya bersama-sama barang kes kepada Pegawai Penyiasat iaitu Inspektor Mohd Hazreen bin Mokhtar (SP6) dengan menggunakan borang serah-menyerah (P33).

[11] SP6 telah menyimpan kesemua barang-barang tersebut di dalam almari berkunci di pejabatnya yang hanya beliau sahaja boleh mengakses ke almari tersebut manakala kereta (P34) yang dirampas telah diletakkan di kawasan parkir pejabatnya.

[12] Pada 14/5/2014 jam lebih kurang 11.30 pagi, SP6 memasukkan barang kes dadah [P13(B)(1–4)] ke dalam kotak yang bertanda 'HM' dan dimeterai 'POLIS DIRAJA MALAYSIA 338' untuk dihantar ke Jabatan Kimia Malaysia, Petaling Jaya. Ahli Kimia iaitu Pn Suhana binti Ismail (SP3) menjalankan analisis dan mengesahkan bahan di dalam empat plastik lutsinar tersebut mengandungi sebanyak 1,454 gram dadah berbahaya jenis Methamphetamine yang disenaraikan dalam Jadual Pertama, ADB. Laporan Kimia berkenaan dikemukakan dan ditanda sebagai 'P29'.

[4] In essence, the case of the prosecution was that a police party led by SP5 went to the targeted area and took up ambush positions. A short while later, a Mitsubishi Lancer ('the said car') arrived and stopped about 15 meters from SP5. The said car was then blocked by the police party. SP5 rushed to the said car and identified himself and ordered the occupants of the car to alight. SP5 said that the respondent, who was seated in the rear seat of the said car behind the front passenger, came out of the said car and threw a black sling bag (P13(A)) near the door of the said car. In the said bag was a plastic bag containing four plastic packets. The contents of the four plastic packets formed the subject matter of the charge.

[5] At the end of the prosecution's case, the learned judge accepted the evidence of SP5 and found no reason to disbelieve his evidence. Citing the cases of *Yusri bin Pialmi v Public Prosecutor* [2011] 4 MLJ 533; [2010] 6 CLJ 878 and *Kesavan Krishnan lwn PP & Satu Lagi Rayuan* [2015] 6 CLJ 163, the learned judge accepted that SP5 was merely doing his duty, did not know the accused persons and was therefore a witness of truth subject to any issues raised in the defence case.

[6] The learned trial judge found that a prima facie case had been established by the prosecution against the respondent. The learned judge accepted that the respondent had custody and control of the illicit drugs as he was seen to have thrown the black sling back (P13(A)), in which the illicit drugs were found, out of the said car. The respondent also tried to run away from the scene but was apprehended by SP5's men. So, according to the learned judge, mens rea possession had been established without the application of the statutory presumption under s 37(d) of the Act. For the element of trafficking, the learned judge invoked the presumption of trafficking under s 37(da) of the Act after taking into account the weight of the drugs seized. The respondent was then ordered to enter his defence on the charge.

[7] The second and third accused persons were, however, acquitted without their defence being called. The prosecution had also appealed against their acquittals but as they could not be traced, this court had earlier struck out the appeals by the prosecution.

THE DEFENCE CASE

[8] The appellant chose to give evidence on oath. He was the sole witness. His evidence was summarised by the learned trial judge as follows (at pp 34–37, appeal record, Vol 1):

> 38.1. Tertuduh Pertama datang ke Malaysia dari Iran sekitar bulan Januari 2014. Tujuan Tertuduh Pertama datang ke Malaysia adalah untuk bertemu dengan seorang penama Ali Rahmani supaya memperolehi visa ke Australia;
>
> 38.2. Penama Ali Rahmani ini merupakan rakan Tertuduh Pertama yang bekerja sebagai ejen teksi semasa di Iran. Tertuduh Pertama yang ingin berhijrah ke Australia meminta bantuan Ali Rahmani dalam menguruskan visa tersebut kerana proses membuat visa berkenaan di Malaysia adalah lebih cepat daripada proses membuat visa di Iran. Tertuduh Pertama membuat bayaran sebanyak USD10,000 ke akaun Ali Rahmani semasa beliau di Iran;
>
> 38.3. Tertuduh Pertama bertemu dengan Ali Rahmani di lapangan terbang KLIA seperti yang telah dirancang kerana Ali Rahmani datang untuk menjemputnya. Tertuduh Pertama tinggal bersama Ali Rahmani di rumah sewa Ali Rahmani yang merupakan rumah jenis pangsapuri berdekatan dengan KLCC selama lebih kurang tiga bulan sebelum Ali Rahmani tersebut menghilangkan diri serta membawa lari paspot Tertuduh Pertama. Tertuduh Pertama ditinggalkan di rumah sewa itu;
>
> 38.4. Tertuduh Pertama cuba mencari Ali Rahmani tetapi gagal. Tertuduh Pertama juga ada menelefon Ali Rahmani tetapi taliannya telah dimatikan. Selepas itu, Tertuduh Pertama pergi ke kawasan di sebelah KLCC dan bertanyakan kepada mana-mana warganegara Iran yang ditemuinya sama ada terdapatnya sesiapa yang mengenali Penama Ali Rahmani tersebut;
>
> 38.5. Tertuduh Pertama seterusnya telah bertemu dan berkawan dengan Tertuduh Ketiga di KLCC. Malangnya, selepas itu Tertuduh Pertama dihalau oleh pemilik rumah yang disewa oleh Ali Rahmani tersebut. Dengan itu, Tertuduh Pertama

A mengambil pakaiannya dan pergi ke KLCC untuk berjumpa Tertuduh Ketiga. Tertuduh Pertama telah menceritakan kejadian yang telah berlaku kepada Tertuduh Ketiga dan Tertuduh Pertama dijemput ke rumah Tertuduh Ketiga ini yang mengambil masa lebih kurang 20–30 minit perjalanan dari KLCC untuk pergi ke sana;

B 38.6. Tertuduh Pertama menyatakan bahawa dia mengikuti Tertuduh Ketiga ke rumah tersebut disebabkan Tertuduh Ketiga dapat bertutur Bahasa Inggeris dengan lebih baik daripadanya. Tertuduh Pertama meminta Tertuduh Ketiga agar menolongnya untuk mengesan Ali Rahmani, membantu menguruskan untuknya menyewa rumah, mendapatkan kembali paspot dan duit yang telah dibayar C daripada Ali Rahmani. Tertuduh Pertama kemudiannya mengenali Tertuduh Kedua melalui Tertuduh Ketiga untuk urusan bagi menyewa rumah;

38.7. Pada hari kejadian jam lebih kurang 10 pagi, Tertuduh Pertama dari rumah Tertuduh Ketiga telah menaiki teksi ke KLCC untuk bersiar-siar kerana berasa bosan di rumah. Ketika Tertuduh Pertama berada di KLCC, Tertuduh Kedua D menghubunginya mengenai urusan rumah sewa dan perkara ini juga ada dimaklumkan oleh Tertuduh Ketiga sehari sebelum ini mengenai Tertuduh Kedua yang akan menghubunginya;

38.8. Tertuduh Pertama selanjutnya semasa berada di tepi jalan telah berjumpa dengan Tertuduh Kedua dan Tertuduh Ketiga. Mereka berdua datang dengan E menaiki kenderaan yang dipandu oleh Tertuduh Kedua. Tertuduh Pertama telah naik kenderaan itu dan tidak menanyakan ke mana arah tujuan dan tidak diberitahu apa-apa juga oleh Tertuduh Kedua dan Tertuduh Ketiga tersebut; dan

38.9. Di tempat kejadian, mereka bertiga telah ditangkap oleh pihak polis.

F

[9] In essence, the defence of the respondent was that he had no knowledge of the drugs in the bag and consequently, no possession. The bag was already in the car when the respondent entered the said car. When the said car was raided, he also ran out of the car as both the driver (second accused) and the front G passenger (third accused) ran out of the said car. The respondent claimed that he did not throw the bag as alleged.

[10] At the conclusion of the trial, the learned judge was doubtful that SP5 had seen the respondent throw the bag near the rear wheel of the car in view of H the fact that the third accused had also run out from the same side of the car. His Lordship considered that both the doors could have blocked the vision of SP5.

[11] The learned judge also criticised the prosecution for not calling at least I one other member of the raiding team to say that it was the respondent who threw the bag. The learned judge also considered that the prosecution could have called the second and third accused as 'rebuttal evidence or witness' to rebut that the bag was already in the said car when the respondent got into it. In the result, the learned judge came to the finding that the prosecution had

failed to prove the charge against the respondent beyond reasonable doubt. An order of acquittal and discharge followed as a consequence.

THE INSTANT APPEAL

[12] Before us, the pivotal issue raised by the appellant was that the learned judge, after finding that SP5 was a credible witness, had a change of heart and made what was effectively a reversal of his earlier finding that there was no reason to disbelieve the evidence of SP5. This issue was critical in that it involved the question of possession and knowledge of the impugned drugs by the respondent.

[13] The criticism that was fashioned before us was that having accepted the credibility and evidence of SP5, the learned judge went on to hold that a reasonable doubt had been raised by the defence when no evidence was produced in the defence case which undermined the credibility and evidence of SP5.

[14] Now, to be fair, the learned judge had reconsidered the evidence of SP5 and came to the view that it was doubtful as to whether SP5 could have seen the respondent throwing the bag as his view would have been blocked by the doors of the car. This could have been so as the third accused had also come out of the car on the same side as the respondent and hence SP5's view would have been blocked by both the doors of the car. The question now is: was the learned judge entitled or justified in arriving at such a finding after clearly expressing the view that there was no reason to disbelieve the evidence of SP5.

[15] On the issue of revisiting an earlier finding, the Federal Court in *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692 had this to say (at p 63 (MLJ); p 709 (CLJ)):

> [38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.
>
> [39] In *PP v Khong Soh* [1966] 2 MLJ 137; [1966] 1 LNS 141 Macintyre J said this at p 139:
>
> > Having held that a prima facie case had been made out against the respondent, the learned president should have given his reasons for holding why the respondent's evidence had created a reasonable doubt in his mind.
>
> [40] Thus, in the present case the learned trial judge, having given the evidence before him the maximum evaluation before calling for the defence, should have therefore focused on whether the defence had cast a reasonable doubt in the

A prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond reasonable doubt before finding the appellants innocent or guilty for the offence as charged.

B **[16]** On this score, we would surmise that having accepted the evidence of the prosecution witnesses and having decided that a prima facie case had been established, the duty of the trial judge was then to evaluate the evidence of the defence and then decide, firstly, whether the defence had cast a reasonable doubt on the prosecution's case and secondly, if the defence had not done so, whether the prosecution had proved its case beyond reasonable doubt.

C

[17] So, the question which the learned judge in the instant case had to contend with was whether the defence had cast a reasonable doubt and then whether the prosecution had proved its case beyond reasonable doubt. In this respect, the evidence of SP5 was crucial. If there was any doubt as to his evidence that it was the respondent who threw the bag, the respondent was entitled to an acquittal.

D

[18] In this context, we found the evidence of SP5 to be compelling. At p 82 of the appeal record Vol 3(2) this is what SP5 said:

E

> Saya dan anggota-anggota serbuan kemudian telah keluar dari kereta dan mengepung kereta tersebut. Ketika itu saya mendapati di dalam kereta tersebut terdapat (3) orang lelaki. Ketika itu kedudukan saya adalah di bahagian hadapan kiri kereta tersebut.

F

[19] And further at p 83, appeal record Vol 3(2):

> saya melihat dengan jelas seorang lelaki yang keluar dari pintu penumpang belakang sebelah kiri kereta tersebut telah mencampakkan satu beg di bahagian luar tepi pintu penumpang belakang sebelah kiri kereta tersebut.

G

[20] And at p 84, appeal record Vol 3(2):

> Penama Hassan Jafarpour merupakan tangkapan yang saya lihat mencampakkan beg
>
> Saya juga boleh cam kereta yang mereka gunakan serta lokasi di mana beg dicampakkan oleh penama Hassan Jafarpour.

H

[21] Now, in a criminal trial, witnesses are essential in the unfolding of the narrative of each party. Events of the past are reconstructed. Witnesses attest to these events. Their evidence is presented, then tested by cross-examination and finally evaluated by the trial judge. It is assumed that witnesses will be truthful as they feared the consequences of untruthful testimony. At the end of the trial and before a verdict is delivered, much of the discourse will invariably pivot around the reliability of witness testimony.

I

[22] From experience, there are generally three types of witnesses at a trial. The first two are clear cut. They are the truthful and untruthful witnesses. The third type of witness can sometimes provide some difficulty to the trial judge. This is the truthful but mistaken witness. In other words, this is a witness who is telling the truth as he perceives it but he may be mistaken as to what he saw or heard. Acuity of hearing or observation may differ among witnesses. So his credibility, in one sense, is not in doubt but the accuracy of his evidence is although some might say a witness is not credible if he is mistaken in his testimony.

[23] In this context, it is interesting to note that under s 146(a) of the Evidence Act 1950, when a witness is cross-examined, he may be asked any questions which tend 'to test his accuracy, veracity or credibility' thus implying that there is a difference between the three characterisations. This is fortified by s 155 of the Evidence Act 1950 where the impeachment of a witness appears to be limited to an attack on a witness's truthfulness. This much can also be gathered from the celebrated case of *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57 where Taylor J opined that where a witness is able to explain the material differences, his credit is saved but there may be a doubt as to the accuracy of his memory.

[24] Even so, Yong Pung How CJ in *Kwang Boon Keong Peter v Public Prosecutor* [1998] 2 SLR 592, sought to make a distinction between credit and credibility of a witness in the following way (at p 602):

> Nokes, in the fourth edition of *An Introduction to Evidence* at pp 407–408, sought to define and distinguish between credit and credibility. The learned author stated that credit involves 'antecedents, associates, character, impartiality and consistency' while credibility concerns the 'opportunities for a power of observation of the witness, his accuracy for recollection, and capacity to explain what he remembers'. It can thus be deduced that the credit of a witness refers to his character and moral reliability whereas the credibility of a witness refers to his mental capacity and power to be a witness of veracity.

[25] It can therefore be surmised that the Evidence Act 1950 refers to both the narrower definition of witness credit which focusses on the truthfulness of a witness and the broader notion of credibility which encompasses both truthfulness and accuracy of evidence. In this way, the credit of a witness can only be impeached under s 155 of the Evidence Act 1950 on the ground of witness untruthfulness.

[26] Reverting to the instant appeal, there was no question of SP5 being unworthy of credit. There was no issue of SP5 fabricating evidence and being untruthful. His credibility was challenged on the basis that SP5 could have been mistaken in his evidence about the respondent throwing the bag. To put

A it in another way, the evidence of SP5 was challenged on the ground that his evidence was unreliable and not safe for the court to act upon based on the reasons given by the trial judge.

B **[27]** In this respect, it was conceded that SP5 was never challenged as to what he saw. It was never suggested to SP5 that he was mistaken or that he could not have seen the respondent throwing the bag as his vision was blocked. Surely, if it was not the case that it was the respondent who threw the bag, there would have been a vigorous and spirited cross-examination of the accuracy and reliability of SP5's evidence. Failure to do so, we would agree, amounted to C acceptance of the witness's testimony, in this case SP5 (*Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212).

D **[28]** In coming to his view, the learned judge criticised the prosecution for not calling other witnesses to say that it was the respondent who threw the bag. With respect, this criticism is unwarranted as a witness cannot be disbelieved only on the ground that he was the only witness. No particular number of witnesses are required to prove any fact (s 134 of the Evidence Act 1950). Unless it is a type of situation where corroboration is mandatory, the testimony E of a single witness may be sufficient to ground a conviction (see *Selvam a/l Arjunan v Public Prosecutor* [2012] 4 MLJ 755 where the following Indian cases were cited with approval; *Badri vs State of Rajasthan* [1976] 1 SCC 442; *Vadivelu Thevar and Chinniah Servai vs The State of Madras* AIR 1957 SC 614 and *Ram August Tewari And Ors vs Bindeshwari Tewari And Ors* AIR 1972 Pat F 142).

[29] The criticism by the learned judge that the prosecution should have called either the second or third accused as rebuttal witnesses was also misplaced as they were also charged together with the respondent under s 34 of G the Penal Code. The prosecution had accordingly appealed against their acquittal. So again, no criticism is warranted.

[30] In the circumstances, we were constrained to hold that the learned judge, with respect, had entertained a fanciful or imaginary doubt based on H conjecture rather than one raised by the evidence. In this context, leaping to mind are the pertinent observations of Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372 at p 373:

> I That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence 'of course, it is possible but not in the least probable', the case is proved beyond reasonable doubt.

[31] We were mindful that an appellate court must be slow in disturbing a finding of fact arrived at by a judge who had the audio-visual advantage of seeing the witnesses (see *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38). However, an appellate court has jurisdiction to interfere with a trial court's finding of facts if, after considering the entirety of the evidence, the appellate court was satisfied that the finding and the order of acquittal was against the weight of the evidence and had led to a miscarriage of justice.

[32] Given the evidence we have alluded to in the foregoing, it was plain to us that the finding of acquittal by the learned judge was against the weight of evidence and in particular the unchallenged evidence of SP5 that it was the respondent who threw the bag. As noted by the learned judge, the respondent could have left the bag in the car but he chose to throw it out of the car. As correctly observed again by the learned judge, if there was nothing incriminating in the bag, then why throw it out of the car. In our view, the evidence of throwing the bag by the respondent precipitated the irresistible inference that the respondent knew the bag contained illicit drugs.

[33] Now, the respondent in his testimony, raised the existence of one Ali Rahmani. In our view, the learned judge was right in finding that the existence of Ali Rahmani had no bearing on the illicit drugs recovered at the time of the respondent's arrest. In any event, we agree with the learned judge that this character was created by the respondent as his involvement with the respondent was never raised prior to the evidence of the respondent.

[34] In all the circumstances of the case, the respondent, in our view, had failed to cast any reasonable doubt on the case for the prosecution. He was proved to have been in possession with knowledge of the illicit drugs at the material time stated in the charge. He had also failed to rebut the presumption of trafficking. After considering the entirety of the evidence, we found that the prosecution had proved the charge against the respondent beyond a reasonable doubt. The respondent, to our minds, was clearly guilty of trafficking in the drugs mentioned in the charge.

CONCLUSION

[35] In the circumstances, and for the reasons we have given, we were of the view that there were merits in the appeal and that appellate intervention was warranted. Accordingly, we allowed the appeal and set aside the order of acquittal by the High Court. In its stead, the respondent was convicted on the charge and sentenced to death.

A *Appeal allowed; order of acquittal by High Court set aside; and respondent convicted and sentenced to death.*

Reported by Ahmad Ismail Illman Mohd Razali

B

C

D

E

F

G

H

I